IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05/03/2004

CORAM

THE HONOURABLE MR. JUSTICE P. SHANMUGAM
AND
THE HONOURABLE MR. JUSTICE M. THANIKACHALAM

CRIMINAL APPEAL NO.185 OF 1996

1.Mohan@ Mohandas
2.Siruthan @ Mohandas
3.Moorthy @ Natesan
4.Murugesan
5.Kesavan
6.Arasu@ Arjunan ..Appellants

-Vs-

State by
Inspector of Police
Mudaliarpet Police Station
Pondicherry ..Respondents

Criminal Appeal is filed against the judgment dated 18.1.1996 made in S.C.No.46/1995 of the Principal Sessions Judge, Pondicherry.

!For appellants 1,3,4 & 6: Mr.R.Sankara Subbu

For Appellants 2 & 5 : Mr. N.G.L. Sankaran

^For respondent : Mr.A.P. Suryaprakasam
Addl. Public Prosecutor,
Pondicherry

:J U D G M E N T

M.THAKACHALAM,J.

The challenge under this Criminal Appeal is the conviction and sentence imposed upon the accused by the Principal Sessions Judge, Pondicherry in S.C.No.46/95 for various offences.

2. The Inspector of Police, Mudaliarpet Police Division, Pondicherry had filed a final report against all the accused/appellants, seeking appropriate punishments under Sections 148, 302 and 324 I.P.C.

alleging that on 7.10.94 at about 6.30. p.m., all the accused formed themselves as unlawful assembly, with the common object of committing riot and in pursuance of the same they have wrongfuly restrained some of the prosecution witnesses, as well as one Kuppan; that with an intention to commit murder they have assaulted Kuppan @ Kuppusamy with deadly weapons, thereby causing his death and that they have also inflicted injuries to some of the prosecution witnesses, in this view they should be dealt with accordingly.

3. The learned Principal Sessions Judge satisfying himself to frame charges, originally charged all the accused under Sections 148, 302 and 324 I.P.C (three counts). Later on revised charges were framed against A 1 to A 6 under Section 148 and 341 I.P.C., in addition framing a charge under Section 302 I.P.C. against A 1, A 2, A 5 and A 6, Further a charge against A 3 and A 4 was framed under Section 302 read with 149 I.P.C. For the grievous injuries caused to one Abimannan, a charge under Section 326 I.P.C. is framed against A3, A4, A6 and roping A1, A2, A5 under Section 3 26 read with 149 I.P.C. In addition for causing injury to one Subramaniam, against A3, A4 and A6 charge under Section 324 I.P.C.is framed whereas against A1, A2 and A5 a charge under Section 324 read with 1 49 is framed. For the injuries said to have been caused to Muthulakshmi, against A1 a charge is framed under Section 323 I.P.C. whereas A 2 to A6 were charged under Section 323 read with 149 I.P.C. In the incident one Anitha also sustained injuries, for which A4 was directed to face the charge under Section 323, whereas A1, A2, A3, A5 and A6 were directed to face the charge under Section 323 read with 149 I.P.C. One Prakash also sustained injuries, along which A 3 was directed to face the charge under Section 323 I.P.C whereas other accused were directed to face the charge, under Section 323 read with 149 I.P.C.

4. All the accused have denied their involvement and in this view they pleaded not guilty, thereby compelling the prosecution to march as many as 21 witnesses armed with 71 documents and 28 material objects. To cast cloud upon the prosecution evidence thereby to create doubt, on behalf of the accused, through prosecution witnesses, D 1 to D 4 have been exhibited.

5. The learned Principal Sessions Judge, while evaluating the above materials and evidencing value, had come to the conclusion that no offence is made out against the accused, under Section 148 I.P.C. and consequently, he came to the conclusion, that the read with offence, under Section 149 I.P.C.is not sustainable, whereas he came to the conclusion, that the accused are liable to be dealt with, the substantial offence read with Section 34 I.P.C. In this view, he sentenced A 1 to A 6 to undergo 3 months simple imprisonment, for the offence under Sections 341 read with 34 I.P.C. The accused/appellants were directed to suffer life imprisosnment, for the proved offence under Sections 302 read with 34 I.P.C., in addition imposing a fine of Rs.100/- each, in default, to undergo rigorous imprisonsment for one month. For the offence under Sections 326 read with 34 I.P.C., all the accused have been directed to suffer 10 years rigorous imprisonment plus payment of a sum of Rs.50/- as fine each, in default, to undergo rigorous imprisonment, for one month. All the accused were sentenced, each, to undergo rigorous imprisonment for one year under Sections 324 read with 34 I.P.C. and

for the offence under Sections 323 read with 34 I.P.C. they were directed to suffer simple imprisonment, for six months further ordering that the sencente of imprisonment to run concurrently, and the default sentence for the non-payment of fine, consecutively.

6. The facts leading to the conviction as disclosed by the prosecution witnesses in brief:

(a) Tmt Muthulakshmi, P.W.6 is the wife of one Kuppusamy whose sons are Ashok(P.W.1) and Prakash (P.W.8) and their daughter is Anitha (P.W.7). The accused/appellants and the abovesaid persons are the residents of Thengaithittu Village, Pondicherry State. Subramanian (P.W.2.), Mannan @ Abimannan(P.W.3) are related to Kuppusamy. Thiru Kuppusamy (P.W.4), Thiru Thangalan (P.W.5) are the brothers of A 6 and A 4 respectively. Thiru Kuppusamy husband of P.W.6 was working as a Watchman in a coconut grove. On 5.10.94 during night hours, the accused/ appellants had stolen some tender coconuts from the said coconut thope. Kuppusamy knowing the same questioned A 1 about his conduct on 6.10 .94 at 5.00 p.m.and slapped A 1 also, on his left cheek, which caused annoyance to him and his relatives.

(b) The mother of A 1, in order to have redress for the act done by Kuppusamy, lodged a complaint to Mudaliarpet police station resulting the police summoning Kuppusamy and his relatives. The police warned both the parties, not to indulge in any assault, directing them to meet the Sub-Inspector, on the next day.

(c) On 7.10.94 at about 6.00p.m. Kuppusamy, Abimannan, Subramanian and Thangalan went to the police station, where they were warned by the Sub-Inspector of Police. Thereafter, while P.Ws.1,2 and 3 were returning in cycles, they were waylaid and wrongfully restrained by A 1 to A 6, armed with weapons near the junction of the road leading to graveyard. A 1 to A 3 pushed down the cycle driven by Abimannan in which the deceased whereas was a pillion rider, A 4 and A 5 pushed the cycle driven by Subramanian. Unexpectedly, and all of a sudden, the accused assaulted Kuppusamy, P.W.2 and P.W.3 with deadly weapons, causing various kinds of injuries. However, P.W.1 escaped from the assault. After the brutal attack, all the accused ran away from the scene of crime, towards Thengaithittu village. Kuppusamy who sustained multiple injuries died in the spot itself.

(d) P.W.6, the wife of Kuppusamy, her son and daughter were standing in front of the house at about 6.45 p.m., on 7.10.94. The accused who had assaulted Kuppusamy, P.Ws. 2 and 3, went to the house of P.W.6 , where A 1 beat P.W.6, A 3 beat P.W.8 and A 4 twisted the left hand of P.W.7, causing fracture. After assaulting P.Ws.6 to 8, all the accused ran towards Naicker's thope, declaring " Fg;gid btl;or; rhfoj;J tpl;n;lhk;/@
(e) P.W.1 returned to the scene of crime after the accused ran away and noticed his father, in a pool of blood dead, in addition P.Ws.2 and 3 with severe bodily injuries. Immediately, he informed the police, who rushed to the scene of crime, admitted Kuppusamy and other injured for treatment by taking them, to the Government Hospital, Pondicherry.

(f) At about 8.30.p.m., P.W.1 narrated the entire incident to the Sub-Inspector of Police-P.W.20 who recorded Ex.P 1. On the basis of Ex.P.1, a case was registered against all the accused in Crime No.81/94 . On receipt of the copy of the first information report, P.W.21 took the case for investigation, reached the scene of occurrence, along with P.W.20 where he had prepared the observation mahazar as well as sketch in addition to recovery of certain material objects, such as blood stained earth etc. On 7.10.94 itself P.W.21 conducted inquest over the body of Kuppusamy and prepared the inquest report.

(g) The doctors who have examined the injured issued wound certificates giving opinion about the nature of injuries sustained by P.W.2, 3 , 7 and 8. The doctor who conducted autopsy also opined that Kuppusamy died due to shock and haemorrhage caused by multiple injuries. In continuation of the investigation P.W.No.21 arrested the accused, examined them, obtained disclosure statements. On that basis some of the material objects have also been recovered. The material objects recovered were sent for chemical analysis which brought in, the serologist report as well as the chemical report. Examining the injured witnesses, other witnesses and completing the investigation, P.W.21 came to the conclusion that the accused are the cause for the death of Kuppusamy and they are the persons who had caused injuries to P.Ws.2,3,7 and 8. In this way, seeking appropriate punishments for the acts committed by the accused, a final report was filed leading to trial, ending in conviction, as aforementioned which is under challenge before us.

7. Heard the learned Counsel appearing for the appellants 1, 3 4 & 6 , Mr. Sankara Subbu and Mr. N.G.L. Sankaran for the appellants 2 & 5 and the learned Additional Public Prosecutor, Pondicherry.

8. The learned Counsel for the appellants, attempted to assail the conviction and sentence imposed by the trial Court on the following grounds, namely, that;
(i)The alleged motive has not been proved by the prosecution;
(ii)There is irreconciliable contradiction even in the oral evidence of the alleged eyewitnesses, which could not be relied on sasfely to sustain the convition;
(iii)There is no clinching evidence indicating which injury was caused by which accused, in order to fix the liability of the accused individually;
(iv)In the absence of a specific charge under Section 34 I.P.C. read with main offence conviction slabed by the trial Court without giving an opportunity to the accused is against law;
(v)That the oral evidence of P.Ws.1 to 3 is not in confirmity with the complaint given by P.W.1, thereby creating natural, reasonable doubt, to which the accused are entitled to the benefit of the same;
(vi)At any event, no case is made out against A3, A4 and A5 for the offence

under Section 302 readwith 34 I.P.C., and
(vii)The act said to have been committed by the other accused, if at all, would attract only Section 304 I.P.C. and certainly not Section 302 I.P.C.

In this view, the learned counsel appearing for the appellants made a

strenuous argument, for acquittal of all the accused, or acquittal of some of the accused, or modification of the sentence also, as an alternative submission.

9. The learned Public Prosecutor while opposing the above arguments, submits that all the accused due to previous enmity formed themselves as unlawful assembly members with an intention to commit murder and in that process they have brutally attacked the deceased Kuppusamy, as well as the persons accompanied him namely P.Ws.2 and 3, which should be viewed very seriously, as did by the trial Court, since the acts of the accused have been proved by the convincing oral evidence of P.Ws.1,2,3,6 and 8, not warranting any interference by this Court. It is the further submission of the learned Public Prosecutor, that the trial Court elaborately discussing the evidence available on record, consistent with law, had come to the conclusion regarding the guilt of the accused, which deserves approval by this Court and the result should be the dismissal of the appeal.

10. The contention of the learned counsel for the appellants that the prosecution has failed to prove the motive part leading to the incident on 7.10.94 at about 6.30 p.m.is unacceptable to us because of the overwhelming evidence available on record that too confirmed by the defence documents also. The deceased Kuppusamy was working as Watchman in a coconut thope is spoken by his son P.W.1, not under challenge. It is the case of the prosecution that on 5.10.94 during night hours, the accused had stolen away the tender coconuts, from the coconut thope in which Kuppan @ Kuppusamy was working as Watchman which was questioned by him on 6.10.1994 at about 5 p.m. leading to slapping of A 1 by the deceased. This part of the case spoken by P.W.1 is convincingly supported by P.W.2, who is an injured witness. It seems as spoken by the Inspector of Police, the deceased Kuppusamy had involved in some other case including a murder case. A1's mother by name Amudha apprehending danger from Kuppusamy preferred a complaint to the police on 6.10.94 at about 10.00 p.m.as evidenced by Ex.D3. In pursuance of the complaint given by A1's mother, as proved by D4, Kuppan (deceased), Ashok-P.W.1, Amavasai, Arumugam were summoned to the police station at about 11.00 p.m. and inquired. Both the parties were warned by the HC 391, and the matter was placed before the SubInspector of Police, for further action, if any. Thus, it is proved by the oral evidence of P.Ws.1 and 2 as well as by D3 and D4, that there was a dispute between the deceased and A1 and the dispute must be with reference to the stealing of tender coconuts, from the thope which was under the control of the deceased Kuppan though the actual mode of offence or the theft of tender coconuts is not speficically mentioned in D 3 and D 4. The complaint was given by A 1's mother, who was accused by the deceased, for committing theft of tender coconuts. Therefore, we cannot expect from the mother of A 1, that fact would be disclosed in the complaint. Probably, only in this way suppressing the act committed by A1, his mother had preferred a complaint, accusing the deceased Kuppusamy, Ashok etc. Because of this reason alone, nothing is said about the theft of tender coconuts in Exs. D 3 and D 4. The attempt made by the learned counsel for the appellants, taking advantage of this fact, that the prosecution has failed to prove the motive part, namely, theft of tender coconuts, on the previous day is not acceptable to us. Whether it is a theft of tender coconut, or otherwise, there was a dispute

between the deceased and A 1 and his friends is more or less admitted, and accepting the oral evidence of P. Ws.1 and 2 we conclude that there was a strong motive for A 1 and his friends to attack the deceased Kuppusamy since he had assaulted a 1, previously, i.e.on 6.10.94.

11. It is the specific case of the prosecution, that while P.Ws. 1 to 3 and Kuppan were returning from the police station, the incident had taken place, near a road junction leading to graveyard. If we should accept this case, it must be shown that the deceased and injured were returning from the police station. According to the submission of the learned counsel for the appellants, that the previous dispute between the parties were over and closed on 6.10.94 itself at about 11.00 p.m. and thereafter, there was no chance, for the deceased and his men to go to the police station on 7.10.94 which should follow, the alleged assault by the accused must be incorrect. By going through the oral evidence of P.Ws.1,2 and 3 and the recitals found in Exs. D 3 and D 4 we are unable to affix our approval, to the abovesaid contention. It is not the case of the police, as seen from Exs. D3 and D4 that the dispute between the accused and the deceased were finally closed. On the other hand, Ex.D4 says, that the matter has to be placed before the Sub-Inspector of Police, probably for further action. This Sub-Inspector has been examined as P.W.20. Only through P.W.2 0, during the cross-examination Exs.D3 and D4 were exhibited. It is not the case of the accused, that when P.W.20 was in the box, a competent person to speak about the disposal of the complaint given by A 1 's mother, that the matter came to an end on 6.10.94 itself and thereafter police had not summoned neither Kuppan nor his men on 7.10.94. In the absence of any such case considering the fact that the matter was placed before the Sub-Inspector of Police for further action, accepting the oral evidence of P.Ws.1,2 and 3, we are constrained to conclude that the deceased and his men might have gone to the police station, on 7.10.94, as directed by the police, is supported by Ex.P 1, which came into existence, immediately after the incident, without any loss of time.

12. In Ex.P1, P.W.1 has stated that in pursuance of the complaint given by A1's mother, the father had been to police station and thereafter on 7.10.94, he along with others had been to Mudaliarpet informed Muruganandham about the police case and were returning at about 8.30 .p.m. The time appears to be incorrect. Accordance with this statement alone, P.W.1 has stated that on 7.10.94 at about 6.00 p.m. he had been to police station, along with his father, Abimannan, Susbramanian and Thangalan. It is the further case of P.W.1, that the police have warned them, not to indulge in any such act, to assault and while returning the incident had taken place. It is clarified further from P.W.1, how they had been to the police station on 7.10.94, to have some recommendations, by using the influence of one Muruganandham. P.W.2, though failed to give detailed account, how they were returning from the police station, during the examination in chief, it is elicited during cross-examination, in detail. He has stated, on 7.10.94 about 6.30.p.m. the Sub-Inspector advised them not to indulge in any more assault, and thereafter, they were proceeding in the cycle. Nothing is elicited to discredit the oral testimony of P.Ws.1 and 2, which is well supported by Ex.P.l also regarding their return from the police station when the incident had taken place. Therefore, the contention of the learned counsel for the appellants, that the

story of the prosecution that the incident had taken place, while the deceased and others were returning is unacceptable; is not acceptable to us in view of the overwhelming evidence, pointed out supra. In this view of the matter, we come to the cconclusion that the incident might have taken place while the deceased, P.Ws.1 to 3, were returning from the polices station and that is why immediately the police had also rushed to the spot, on information and quickly, acted in apprehending the accused, preceded by investigation. Thus, fixing the motive and concluding that there is every reason to believe that the accused might have attacked the deceased, we have to see whether the accused had actually attacked the deceased, P.Ws.2,3, 6 and 8.

13. Subramanian-P.W.2 was admitted in the Government Hospital on 7.1 0.94 at about 8.30 p.m. He reported to the police, that he was assaulted by known six persons on 7.10.94 around 7.30.p.m. near Mudaliarpet Sudukadu Pathai thereby indicating the involvement of six accused/ appellants. The doctor-P.W.16 who attended P.W.2 noted the following injuries as seen from Ex.P.22 and they are
(1)Cut injury Left forearm about 10 cm X 4 cm x 2 cm x semicircular cut injury
(2)Linear abrasison in the left scapular area about 15 cm in length extending upto left shoulder.

The injuries sustained by P.W.2, is simple in nature and it could have been caused by deadly weapons. Therefore, if this injury was caused by any of the accused they should be convicted under Section 324 I.P.C.

14. The doctor N.L.Thandapani (P.W.15) admitted Abimannan (P.W.3) for treatment on 7.10.94 at about 7.30.p.m. On examination he had noticed the following injuries:

'Incised wounds over the scalp (10 cm x 3 cm x 2 cm), Left forearm (frontal region) (4 cm x 3 cm x 2 cm), Right shouler 4cm x 3 cm x 2 cm)'

as indicated in Ex.P.21. Considering the Expert's Report which disclosed fracture of frontal bone, the doctor opined that P.W.3 sustained grievous injuriy. The nature of injury though attempted to be dislodged, we find no reason to ignore the finding, given by the Expesrt namely P.W.15. Accepting the oral evidence of P.W.15, we conclude that P.W.3 sustained grievous injuries, in the incident narrated in the final report.

15. Abimannan has reported to the doctor, as if some unknown persons had assaulted him near Thengaithittu at about 7.00 p.m.on 7.10.94. Taking advantage of the same, the learned counsel for the appellants contended that the oral evidence of P.W.3 could not be accepted and acted upon, since he had stated to the doctor, as if he was assaulted by unknown persons. It is not known under what circumstances, the doctor had written so. When P.W.3 had spoken about the identity of the accused, it is not the case of the accused, that he is a stranger and he could not identify them. In this view, ignoring the entry in Ex.P.21, we proceed that P.W.3 would have sustained injuries, in the hands of the known persons, and if it is proved that one of the accused or some of the accused are responsible for the grievous injuries caused to P.W.3, then they should be dealt with under Section 326 I.P.C. as did by the trial

Court.

16. The doctor R.Balaraman-P.W.17, at the request of the investigating officer conducted autopsy over the body of Kuppusamy on 8.10.94 between 1.00 p.m. and 2.00 p.m. It revealed the following injuries, as indicated in Ex. P.26.

1.Multiple Incised wounds present all over back of head over an area of 22 X 18 cms exposing fractured skull and brain matter.

2.Incised wound 2 x 0.5 x 0.5 cms over right side of right eye.

3.Incised wound 12 x 2 x 2 cms over right side of face between right ear and mouth.

4.Incised wound 6 x 1 x 1 cms below lower lip on right side cutting bone partly.

5.Incised wound 10 x 2 x 2 cms over left side of face cutting left ear partly.

6.Incised wound 10 x 2 x 3 cms over left side of face extending upto angle of mouth.

7.Incised wound 8 x 2 x 1 cms over middle of left forearm.

8.Incised wound 3 x 0.5 x 0.5 cms over chest hear right axilla.

9.Incised wound 5 x 1 x 2 cms over right hand below thumb.

10.Incised wound 6 x 1 x 1 cms over right side of lower abdomen.

11.Incised wound 2 x 1 x 1 cms over left side of lower abdomen.

12.Incised wound 8 x 1 x 1cms over back of neck (Transversely placed)

13.Parallel linear contusions 11 x 9 cms present over back of right leg.

14.Contusion 10 X 1 cmsa present over left side of neck

Internal Examination : Skull - comminuted fracture of vault of skull present. Brain - Extensively lacerated.

He had opined on the basis of the external injuries, as well as internal examinations of the deceased, considering the effect of injuries, that Kuppusamy died of shock and haemorrhage, which caused due to multiple injuries.

17. During the cross-examination he has stated that the fracture of the skull, as such alone cannot cause death, adding that it can cause death, if it is associated with internal bleeding. The first injury is

described as multiple incised wounds, all over back of head, over an area an area of 22 X 18 cms exposing fracture of skull and brain matter and the internal examination also revealed, comminuted fracture of vault of skull. Thus, it is seen, in the head injury, there was internal bleeding exposing the brain which should be fatal causing death. As spoken by the witnesses Kuppusamy died instantaneously because of the chopping all over the body causing number of incised wounds. We find no difficulty, in concludingthat Kuppusamy met with homicidal death. If the prosecution is success, in establishing that some of the injuries, including the fatal injuries were, caused by the accused, that too, with common intention and in furtherance of common intention, the accused so did, could be convicted under Sections 302 readwith 34 I.P.C. despite the fact, they were not convicted under Section 149 I.P.C. There may not be any legal complaint, for not giving any opportunity, to face the charge under Section 34 I.P.C. since they were directed to face the charge under Section 149 I.P.C. Also, which says common object, whereas Section 34 I.P.C. says common intention, followed by some act done by the accused, in furtherance of the common intention. Depending upon the common intention, and the susbsequent overtacts the accused could be dealt with.
18. P.W.16 examined Muthulakshmi (P.W.6), Anitha (P.W.7) and Prakash (P.W.8) on 7.10.94 itself at about 9.40 p.m. He has opined in Ex. P.23 that injuries sustained by P.W.6 is simple in nature and the injury sustained by P.W.7 is also simple in nature in Ex.P.24.

19. is directed to face the charge, under Section 323 I.P.C., for causing simple injury to P.W.6 Muthulakshmi. A4 is directed to face the charge under Section 323 I.P.C. for voluntarily causing simple hurt, to one Anitha P.W.7. A3 is directed to face the charge under Section 323 I.P.C. for causing simple hurt to Prakash P.W.8. The other accused are directed to face the charge correspondingly under Section 323 r/w 149 I.P.C. But, the trial Court had sentenced all the accused to undergo simple imprisonment for six months under Section 323 r/w 34 I.P.C. The direct charges against A1, A3, A4 are not seriously challenged, by the learned counsel for the appellants. Though the remaining accused were directed to face charge under Section 149 I.P.C, the conviction slapped under Section 34 I.P.C. appears to be legally unsound. For the individual act alone, if at all A1, A3, A4 could be convicted in this case under Section 323 I.P.C. and invoking Section 34 I.P.C. is not permissible, as far as Section 323 I.P.C. is concerned. Section 34 I.P.C. will come to the aid of the prosecution, to rope in all the accused, when a criminal act is done by several persons, in furtherance of the common intention of all.To attract Section 34 I.P.C., it should be shown that when A1, A3 & A4 had attacked Muthulakshmi, Prakash & Anitha respectively, the other accused also had done some act, in order to say that in furtherance of common intention, all the accused had acted, in reaching the destination. Here, except clinching evidence against A1, A3 and A4, for their individual act, assaulting Muthulakshmi, Prakash and Anitha, we find no evidence of any kind, against other accused, except their mere presence, which alone will not be sufficient, to attract Section 34 I.P.C. In this view of the matter, we are inclined to interfere with the findings of the trial Court, regarding the conviction slapped against A2, A5 & A6, under Section 323 r/w 34 I.P.C. P.Ws.6 to 8 had spoken about the individual act of A1, A3, & A4 and the

injuries sustained by them which are corroborated by the medical men, as indicated above. In this view and considering the fact, that conviction under Section 323 I.P.C. is not challenged, we would choose to confirm, the finding

under Section 3 23 I.P.C., upholding the conviction and sentence as far as A1, A3 & A4 alone are concerned, setting aside the conviction and sentence under Section 323 r/w 34 I.P.C. as far as A2, A5 & A6 are concerned.

20. The learned counsel for the appellants contended, that the conviction slapped against A3 and A5 could not be sustained, because of the fact, that there is no evidence against A3, implicating him and because of the intrinsic evidence available, for the inclusion of A5 subsequently. In support of the above contention, our attention was drawn to Ex.P.1, as well as the oral evidence of the investigating officer, P.W.21. In Ex.P.1, all the names of the accused were mentioned indicating their presence, at the first instance. As far as A5 is concerned, no overt act is attributed, against him, at the first instance, for the assault of Kuppan @ Kuppusamy. As seen from the original of Ex.P.1, the name of "Kesavan" (A5) is inserted, at later point of time. There is nothing wrong, if the insertion had taken place, before the case is registered against the accused, and it could be easily explained, that mistake was noticed, then rectified. Here, as seen from the original printed F.I.R., when the case was registered, against the accused, no overt act is attributed, for the death of Kuppusamy against A5. Only thereafter, probably at the intervention of interested persons, "Kesavan" is inserted, by interaliation as if he had assaulted Kuppusamy, contributing his might also, for the death. In Ex.P.1 ,for causing the death of Kuppusamy, A1, A2 and A5 are blamed. When we come to the evidence, A1, A3 & A6 were implicated, as if all of them had assaulted the deceased. This inconsistent evidence, coupled with material alteration, in the complaint, as well as in the printed F.I.R., unhesitatingly prompts us to think, that A5 might have been implicated at later point of time, even without his actual involvement, in the incident, narrated in the final report. Thus, an indelible doubt had arisen reasonably, spontaneously, on going through the document, as well as the evidence, and therefore, the 5th accused is entitled to the benefits of the same, and in this way, he is entitled to an acquittal, though an attempt is made by the prosecution witnesses, to speak that A5 also involved in the incident.

21. The learned counsel for the appellants submits, that P.W.1 could not be the eyewitness and therefore, the complaint given by him, on which basis, the case has been investigated, entertains a doubt regarding the genesis of the prosecution. We are unable to agree, by going through the oral evidence of P.W.1, though he is the son of the deceased. P.W.2 is one of the injured witnesses, and his presence cannot be doubted. P.W.3 is also another injured witness, and his oral evidence also cannot be questioned. In the oral evidence of P.Ws.1 & 2 , if there are some exaggeration or some grain of untruth, that has to be separated, which is the duty of the court. Taking into consideration only the exaggeration of the victims, eclipsing their entire evidence, is not the proper way, to appreciate the oral testimony of the prosecution witnesses. The way in which P.Ws.1 & 2 have narrated the incident, inspires us, to accept their testimony, to the maximum extent, giving the benefits of doubt, to some of the accused, to the extent, they have

not been properly implicated with the crime.

22. It is the case of the prosecution, that while P.Ws.1 to 3 and the deceased were returning from the police station, in three cycles, they were waylaid and wrongfully restrained by the accused. Those cycles are M.Os.1, 6 & 9. As seen from the observation mahazar, all the cycles were recovered, from the scene of crime and identifying the same, P.Ws.1, 2 & 3 had spoken about the fact of their cycling, from the police station to their house. P.W.1 had specifically stated, in Ex.P.1 that he was the pillion rider in the cycle driven by Abimannan, and P.W.2 was the pillion rider in the cycle driven by P.W.5, though it is not supported by P.W.5, being the relative of one of the accused. In conformity with the averments found in Ex.P.1, P.Ws.1 to 3 had categorically deposed about their return, in the cycles. P.W.1 would state when all were preceding towards their home, at Thengaithittu, A1 to A6, who were near the road, hiding elsewhere, all of a sudden came there, pushed down the cycle driven by Abimannan, thereby causing the fall of Kuppusamy. He had also spoken further that A4 & A5 pushed the cycle driven by Subramaniam. This evidence so given by P.W.1, is fully corroborated by the injured witnesses viz., P.Ws.2 & 3. Thus, it is seen, as rightly held by the lower Court, that all the accused had waylaid the deceased, and others and for these joint and several act, they must be held responsible under Section 341 I.P.C., though not under Section 302 r/w 34 I.P.C. directly.

23. The fact, in the incident, which took place on 7.10.1994, at about 6.30 p.m. at the scene of crime, Kuppusamy sustained severe injuries, is not in dispute and he succumbed to the same, is also proved. For the death of Subramaniam, though charge was framed against A1, A2, A5 & A6 directly, and against the remaining accused under Section 302 r/w 149 I.P.C., conviction was not slapped under the above said section, whereas all the accused were found guilty, under Section 30 2 r/w 34 I.P.C. It is not known why the trial Court had not found guilty, all the accused under Section 148 or 147 of I.P.C., as the case may be, since it had accepted the unlawful assembly of more than five persons, at the time of the incident. Instead of invoking Section 149 I.P.C., the trial Court had convicted the accused invoking Section 34 I.P.C. The acquittal of the accused under Section 148 I.P.C. or non conviction of the accused under Section 148 I.P.C., is not challenged before us.

24. As far as A1, A2 & A6 are concerned, we find materials against them, for the offene under Section 302 r/w 34 I.P.C. As already indicated by us, A5 appears to have been implicated subsequently and therefore, he cannot be held responsible under Section 302 I.P.C. directly or otherwise. The learned counsel for the appellants submits, that for convicting all the accused under Section 34 I.P.C., there is no material, to prove the common intention or any act said to have been done by all the accused, in furtherance of the common intention and therefore, if at all conviction should be sustained, against the accused, those who have directly involved, in sharing the intention, by doing some act and not against all the accused. Considering the facts and circumstances of the case, we find some force, in the above contention, which was lost sight of, by the trial Court.

25. In Ex.P.1, originally P.W.1 had stated that Mohan and

Siruthai, (A1 & A2) had attacked his father, over his face and head, declaring to die. The name of A5 is subsequently inserted, as aforementioned by us. Therefore, it could be safely concluded that A5 had not participated, in attacking Kuppusamy, though he was present and that is why his name is not specifically given, while describing the overt act. P.W.1 had given evidence, as if A1 to A3 alone assaulted his father, with the knife and face and all over the body, causing cut injury. It is not the case of P.W.1, that A5 also ca used injuries to the deceased, whereas it is the case of P.W.1, that A5 chased him with a knife and at that time, he ran away. Thus, it is seen, the oral evidence of P.W.1 fails to implicate the involvement of A5 as well as A4, attributing any act. P.W.2 also would state that A1 to A3 alone assaulted the deceased, with knives and caused cut injuries on the head, face, mouth and all over the body. P.W.3 on the other hand would state, that A1, A2 and A5, altogether brutally assaulted the accused, thereby failing to implicate A3 as well as A4. In Ex.P.1 also the involvement of A3, in attacking the deceased is not stated. P.Ws.1 & 2 though had stated before the Court, as if A3 had also participated in the assault, as admitted by the investigating officer, it is not their evidence, while recording the statements. Under the above said circumstances, the involvement of A3 is doubtful, though he was present at the time of the incident. If A3 had been present, nothing would have prevented P.W.1, from mentioning his name in Ex.P.1, as the person who assaulted his father and in the same way, nothing would have prevented P.Ws.1 & 2 also to give statement before the investigating officer stating that A3 also assaulted Kuppusamy. In this view, the natural and spontaneous doubt, which had arisen in our mind, compels us to give the benefit of same to A3, relieving him from the charge under Section 302 r/w 34 I.P.C. In the same way, A4 & A5 are also not liable to be convicted, in the absence of any specific overt act against them, in sharing the common intention, while assaulting the deceased, by doing any act. Thus, A4 & A5 are also entitled to the benefits of doubt and the result should be their acquittal.

26. The learned Additional Public Prosecutor is also unable to substantiate the finding of the guilt against A3 to A5, on the basis of the materials available on record. Therefore, the remaining accused are, as far as 302 is concerned, A1, A2 & A6. The incident had taken place on 7.10.1994 at about 6.30 p.m. or so. Immediately a complaint was given to P.W.20, at about 7.00 p.m. resulting registration of case under Sections 147, 148, 341, 302, 307, 324, 323 r/w 149 I.P.C. against all the accused, since their name also does find place in Ex.P.1 . We find no delay of any kind, either in recording the information or in sending the printed F.I.R. to the court concerned. However, at later point of time, A5's name is inserted and that is why, we have given the benefit of doubt to A5, from the charge under Section 302 r/w 34 I.P.C. In Ex.P.1, specific averments are available, regarding the overt act, of A1, A2 & A6. The contention of the learned counsel for the appellants that P.W.1 could not be the eye witness, is against the reality. As spoken by P.Ws.1 to 3, consistently, when all of them were returning from the police station, they were waylaid by the accused. P.W.1 ran away from the scene of crime, only after seeing the accused armed with weapons. Therefore, he must have noticed the presence of the accused at least, and the overt act also, standing elsewhere, out of curiosity. Hence, the fact A5 chased P.W.1 or P.W.1 ran away from the scene of crime, will not take him way, from the

definition of eye witness. Even ignoring the oral evidence of P.W.1, we find consistent evidence to rope in A1, A2 and A6, for the offence under Section 302 r/w 34 I.P.C. P.W.1 has categorically deposed about the act committed by A1 & A2, as well as A6. P.W.2 had also deposed that A1 & A2 assaulted the deceased, with knives and caused injuries on the head, face, mouth and all over the body, in addition A6 beat the deceased with M.O.5. The fact some snap answer is elicited from P.W.2 , as if there was no light at the place, where Kuppusamy was assaulted will not eclipse the inspiring evidence of P.W.2, considering the time of the incident. The incident had taken place around about 6.30 p.m. or so and at that time, there will be natural light, to identify the accused, who are already known to P.W.2 In fact, during the cross examination, the individual act of A1 and others also elicited. Another injured witness viz., Mannan @ Abimannan testified, about the attack by A1 & A2 brutally, over the deceased, though he failed to say about the involvement of A6. The answer elicited during the cross examination from P.W.3, that he and the deceased were at the scene of crime and other persons ran away from the scene, is not sufficient to exclude P.Ws.1 & 2 from the definition of eye witnesses, reading the said isolated answer alone. Subsequently, he says, that the deceased shouted at P.W.1 to ran away from the scene and he ran towards the police station, further confirming that he was lying at a distance of about five feet, from the place where the deceased was lying. The inspiring oral evidence of P.Ws.1 to 3 coupled with Ex.P.1 proves beyond all reasonable doubt, that A1, A2 & A6 have assaulted Kuppusamy, with an intention to commit murder, because of the previous motive, and in that process, sharing the common intention, and in furtherance of the same, assaulted the deceased, and their act squarely attracts 3 02 r/w 34 I.P.C.

27. The learned counsel for the appellants submits, that the act of the accused namely A1, A2 & A6, if accepted, the same will not come under Section 302 r/w 34 I.P.C., whereas that should come under Section 304 (ii) I.P.C., placing reliance on certain decisions. Admittedly, at the time of the incident, there was no sudden provocation or heat of passion, in order to say that the acts of the accused would come within the meaning of culpable homicide, not amounting to murder. The learned counsel for the appellants submits that even assuming the acts of the accused do not come within the explanation, they are entitled to invoke Section 304 (ii) I.P.C. and in aid, our attention is drawn to Ruly Ram & Anr. v. State of Haryana [2002 (4) Crimes 344 (SC)]. In the case involved in the above decision, two young boys were thrown into pond, causing death, at the time of election. When the accused were charged under Section 302 I.P.C., the court of sessions held the accused are guilty under Section 304(ii) I.P.C. In appeal, by the State, a Division Bench of Panjab and Haryana High Court, at Chandigarh, held that the accused appellants were to be convicted under Section 302 I.P.C., thereby sentencing them for life imprisonment. The same was challenged before the Apex Court and the Apex Court has ruled, that Section 304(ii) applies, only when exception 1 to Section 3 00 I.P.C. cover a case is misconceived, and even in the absence of explanation, a case can come under Section 304(ii) I.P.C. As observed in the above decision, the accused had no intention to commit murder, but to create some disturbance, at the booth station, in order to divert the attention of the crowd collected, so that the booth capture would be facilitated. It is the further observation, that no injury was

caused to the deceased, before they were thrown into the pond and there was not even an attempt to strangulate them. It is the further observation of the Hon'ble Apex Court, that the accused might have had the knowledge that his act is likely to cause death. In that view, considering the facts and circumstances of that case, the Apex Court ruled that 304(ii) I.P.C. would be attracted, even in the absence of exception (1) to Section 300 I.P.C. Considering the facts and circumstances of the case, this ruling is of no use, for the accused, to escape from the arms of 302 r/w 34 I.P.C. As aforementioned, there was strong motive and A1's mother preferred a complaint to the police, apprehending some danger from the deceased, and the result was the warning by the police, not only on 6th but also on 7th. On 7th, while the deceased and P.Ws.1 to 3 were returning, all the accused joined together, waylaid, wrongfully restrained, by pushing them from the cycle and these acts must be with a predetermination, with an intention to commit murder and this case cannot be compared with the case, involved in the above decision, at any stretch of imagination. Therefore, the proved offence, against A1, A2 and A6 cannot be scaled down to any extent.

28. The learned counsel for the appellants also invited our attention to State of Madhya Pradesh vs. Deshraj and others (2004 (1) Supreme 745, in order to claim benefits under Section 304(ii) I.P.C., excluding 302 r/w 34 I.P.C. In the case involved in the above decision, it seems there was no definite material, which injury was inflicted by which accused. Further some of the accused had also sustained injuries in the fight, thereby giving lever to the accused, to plead 304(ii) I.P.C., such as sudden provocation or heat of passion. Here admittedly, there was no provocation at the time of the incident, and it is a crystalised, pre-planned murder, in which A1, A2 & A6 have actually participated, by assaulting the deceased and therefore, applying Section 304(ii) I.P.C. is beyond the scope of law. Under the facts and circumstances of the case, and in the light of the above observation, we are inclined to confirm the findings of conviction and sentence as far as A1, A2 and A6 are concerned under Section 302 r/w 34 I.P.C., relieving the other accused from this charge, giving them acquittal.

29. A1 to A6 convicted by the trial Court under Section 326 r/w 34 I.P.C. directing them to suffer 10 years R.I. in addition fine, for the grievous hurt caused by them to Mannan @ Abimannan. A3, A4 and A6 were directed to face the charge under Section 326 I.P.C., for causing grievous hurt voluntarily, to Mannan @ Abimannan. The other accused were charged under Section 326 r/w 149 I.P.C. However, the trial Court convicted all the accused under Section 326 r/w 34 I.P.C., imposing 10 years R.I. and fine of Rs.50/- each, for which we are unable to see substantial evidence. Even as per the case spoken by P.W.3, while A3 and A6 caught hold of him, he was attacked by A5, inflicting cut injuries on his left arm, nearby left ear and also over his body, including the right upper arm. But as seen from Ex.P.21, he sustained three injuries alone and all the injuries appear to be grievous hurt. We have already concluded, that the involvement of A5, in assaulting the victim is not proved. No direct charge is framed against A5 under Section 326 I.P.C. Contrary to the prosecution case, P.W.3 had given evidence, as if he was assaulted by A5. During the cross examination, he had stated, that A3, A5 & A6 assaulted him with knives, while A1 pushed the cycle, which was driven by

him. This evidence, whether it is in cross or in chief, was not confirmed and corroborated by P.W.2. P.W.2 would state, that A1 and A3 assaulted Abimannan with knives, which is not the case of P.W.3. P.W.1 would state that A6 also beat Abimannan with stick, which is not the case of P.Ws.2 & 3. The injured himself was not certain, who actually assaulted him and caused which injury. The very fact that P.W.1 sustained some grievous hurt alone could not be taken as the positive proof, to convict all the accused. If P.W.3 had spoken consistent with Ex.P.1, corroborated by other witnesses, as well as according to the charge, then only the conviction could be sustained. On the other hand, we are unable to find a consistent and uniform evidence, regarding the person, who caused injuries to P.W.3, though he sustained grievous hurt in the

incident. In this view of the matter, the conviction slapped upon the accused under Section 326 I.P.C. is not sustainable and all the accused are entitled to an acquittal.

30. A3, A4 & A6 were called upon to answer the charge under Section 324 I.P.C., for causing hurt to Subramanian (P.W.2), while other accused were called upon to answer the charge under Section 324 r/w 149 I.P.C. Subramanian (P.W.2) had deposed that A3 & A4 armed with knives, assaulted him, on his left arm and on the right shoulder, while A6 beat him with M.O.5, all over the body. This evidence is, to certain extent, confirmed by other evidence, as well as the first information report. It is not the case of P.W.2 that A3 & A4 had attacked him, the other accused prevented him from moving or they had also assaulted him, causing injuries. In this view, A1, A2, A5 are not liable to be dealt with under Section 324 r/w 34 I.P.C. and they are entitled to an acquittal. Considering the proved motive and other overt acts, A3, A4 & A6 alone are liable to be convicted, under Section 324 I. P.C. and we are constrained to relieve the remaining accused, from this charge. In the light of the above observation, the appeal is to be allowed to the above said extent.

To sum up,

(1) A1, A2 & A6 are found guilty under Section 302 r/2 34 I.P.C. and their conviction and sentence are confirmed.

(2) A3, A4 & A5 are acquitted from the charge under Section 302 r/w 34 I.P.C., ordering to refund the fine amount paid by each accused for this offence.
(3) A3, A4 & A6 are found guilty and convicted under Section 324 I. P.C. instead of 324 r/w 34 I.P.C., maintaining the sentence, acquitting the remaining accused.

(4) A1, A3 & A4 are found guilty and convicted under Section 323 I. P.C. instead of 323 r/w 34 I.P.C., maintaining the sentence, acquitting the remaining accused from this offence and

(5) All the accused are acquitted from the charge under Section 326 r/w 34 I.P.C., ordering to refund the fine amount paid by them.

Accused A1, A2 & A6 are directed to surrender before the trial Court within 15 days from today, failing which the trial Court is directed to secure the accused to serve out the remaining period of sentence. The other accused viz., A3 & A4 need not surrender as they have already undergone the imposed period of sentence.

sal/kv

To
1. The Principal Sessions Judge
Pondicherry

2. The Sub Divisional Judicial Magistrate,
Pondicherry.

3. -do- thro' the Chief Judicial Magistrate,
Pondicherry.

4. The Officer in Charge, Central Jail, Pondicherry.

5. The District Collector, Pondicherry.
6. The D.G.P., Chennai-4.
7. The Public Prosecutor, Pondicherry

8. The Inspector of Police, Mudaliarpet Police Station,
Pondicherry.